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## **1.0 INTRODUCTION**

In July 1998, the City of Phoenix (City) contracted with MGT of America, Inc. to conduct a second-generation disparity study. This study serves as an update to the City's initial study completed in 1993 and a supplemental study completed in 1995. The primary purpose of the 1993 study was to evaluate race and gender discrimination in accordance with *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989). Upon completion of the study, the Mayor and City Council approved ordinances creating an M/WBE construction subcontracting goals program, a M/WBE goods and services price preference program, a revised M/WBE certification program, and a "race- and gender-neutral small business program." In 1995, the Associated General Contractors of America, Arizona Chapter (AGC) challenged the legality of the City's disparity ordinances by filing a lawsuit in state court. The City then conducted a supplemental study that conducted further research into the use of M/WBE subcontractors on its construction contracts. The 1995 study indicated that "racial and gender discrimination existed in the local marketplace and that there was a significant statistical disparity between the City's utilization of these businesses when compared to their availability in the market." After completion of the supplemental study, the AGC lawsuit was settled with minor adjustments to the City's program.

In this second-generation disparity study report, MGT presents its methodology, findings, and recommendations covering the period from January 1, 1993, to December 31, 1997. The study addresses the business categories of construction, general services, and purchases of goods/equipment. Professional services are excluded from this study.

The findings, conclusions, and recommendations in this study are a direct result of MGT's rigorous methodology; they reflect a full understanding of the City's contracting and M/WBE program; and they demonstrate a deep appreciation and understanding of the importance of this study to the City. The remainder of this introductory chapter outlines the study background, objectives, and scope, and it provides an overview of the technical approach MGT followed in developing our findings, conclusions, and recommendations.

### **1.1 Background**

The first disparity study conducted for the City was primarily as a result of the U.S. Supreme Court decision in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989). In overruling Richmond's minority set-aside plan in that case, the Supreme Court established standards which govern all non-federal minority, women, and disadvantaged business enterprise programs operated by public entities. As a result of *Croson*, disparity studies were conducted nationwide by public entities to investigate and document the existence of disparities or discrimination in their jurisdiction.

Today public entities such as the City have undertaken second-generation disparity studies. These studies incorporate the additional guidance the courts have provided over the past five years. The studies are intended to provide a public entity with statistically significant empirical and anecdotal evidence to allow the entity to determine whether to implement or maintain race- and gender-based remedial programs. The studies also help an entity determine to what extent any existing remedial programs are still appropriate based on current case law. This second-generation disparity study conducted by MGT re-evaluates the City's existing

construction contracting and procurement practices and M/WBE program within the context of the *Croson* decision and subsequent court cases.

## **1.2 Objective and Design of the Study**

The principal objective of this study was to evaluate marketplace discrimination, if any, against minority- and women-owned businesses regarding contracting and procurement opportunities with the City, other public entities, and the private sector. The study addressed the following issues:

- Whether there are ongoing effects of past discrimination against minority- and women-owned businesses in the construction, goods, and general services sectors within the relevant market area, either by the City directly, or, as a passive participant in discriminatory behavior practiced by entities that do business with the City.
- Whether active racial and gender discrimination continues to exist in the local marketplace; whether there is still a disparity between the utilization of minority- and women-owned businesses in the local marketplace compared to their availability, and if not, whether there would be disparities but for the existing programs.
- If there were evidence of discrimination, whether race- or gender-neutral measures would be effective to remedy the discrimination.
- If race- and gender-neutral measures would not be effective to eliminate identified discrimination, whether narrowly tailored race- and gender-specific remedies could be fashioned to redress the discrimination.

Four major requirements set forth in the *Croson* decision guided the study.

- **Strict Scrutiny Standard of Review** – the *Croson* held that state and local minority business enterprise plans that rely on race-based remedies are subject to the strict scrutiny standard of review. Thus, MGT ensured that this disparity study for the City was well structured, carefully performed, and closely analyzed to maximize the possibility that if challenged by legal action, recommended programs based upon this study will survive strict scrutiny.
- **Identifiable Discrimination Directly Related to Public Entities' Contracts** – In *Croson*, the Court rejected attempts by the City of Richmond to rely on general findings of societal discrimination to support the need for its MBE plan. Instead, the Court required

specific proof of the nature and extent of discrimination against minority businesses on the local level. Therefore, MGT evaluated the number of minority businesses and non-minority businesses qualified and available to perform contracts with the City, the number in each category selected to do the work, and the disparity between the two groups.

- **The Need to Evaluate Non-Race-Based Remedies** – Even without a finding of local discrimination, a governmental organization could adopt a series of modifications to its contracting and purchasing procedures which would encourage participation by economically disadvantaged groups without regard to race. In addition, in *Croson*, the Court required consideration of solutions not based on race and gender before race and gender remedies could be adopted. Thus, this study addresses such non-race-based remedies.
- **The Solution Must Be Proportionate to the Problem** – Not only must the problem be defined at the local level, the Court has also required that the solution be based on the nature and extent of the local problem identified. Therefore, based on this standard of review, the City's program must be narrowly tailored to remedy the effects of past discrimination at the local level and must remain in place only so long as is necessary to reverse the effects of this discrimination.

### **1.3 Scope of the Study**

The focus of this second-generation disparity study was to analyze the City's contracting practices in the procurement of construction and purchasing including general services and commodities. If MGT found discriminatory practices, then the City asked MGT to recommend corrective actions appropriate to remedy past or current discrimination. The study therefore included:

- a detailed legal analysis of relevant court cases with an emphasis on program and methodological requirements;
- an in-depth review of the City's contracting and purchasing policies, procedures, and practices;
- a rigorous review of the City's contracting and purchasing records and contract files for the study period;
- a collection of anecdotal data from testimony at public hearings, personal interviews and a telephone survey. These hearings

provided opportunities for interested person to present testimony about past instances of discrimination and opposing points of view, as appropriate, including evidence, corroboration, rebuttals, and denials;

- determination of the number of businesses owned and controlled by minority groups and/or women in the geographic area, calculated for each racial and ethnic;
- identification of the group population of “qualified, willing, and able” minority, women, and non-minority contractors and vendors available to perform work within the market area;
- calculation of the share of construction and purchasing contracts awarded to minority, woman, and non-minority-owned firms;
- performance of disparity analyses for market area firms utilized during the study period;
- evaluation of the success of the City’s price preference program (purchases) in eliminating or reducing the disparity identified in the 1993 study;
- determination of the extent of discrimination identified in the 1993 study and the extent of discrimination against minority- and/or women-owned business enterprises, if any, that would occur if the City’s M/WBE program were discontinued; and
- development of recommendations, based on study findings, to ensure that the City is not a passive participant in discrimination.

#### **1.4 Technical Approach**

In conducting the study and preparing recommendations, MGT followed a carefully designed work plan that allowed study team members to fully analyze availability, utilization, and discriminatory practices with regard to M/WBE participation in the City’s construction contracts and its procurement of goods and services. The final work plan consisted of 12 major work tasks:

- Conduct Detailed Legal Review
- Finalize Work Plan
- Review Policies, Procedures and Practices
- Analyze the Effectiveness of Race- and Gender-Neutral and Race- and Gender-Based Programs

- Conduct Utilization Analyses
- Determine Availability of Qualified Firms
- Conduct Analyses of Utilization and Availability Data for Disparity
- Conduct Regression Analysis
- Conduct Telephone Surveys
- Collect and Analyze Anecdotal Information
- Identify Narrowly Tailored Race- and Gender-Based Remedies
- Prepare Final Report

Each of these major work tasks involved the completion of several subtasks. Monthly progress reports were submitted to the contract manager and interim meetings were held with City representatives.

### **1.5 Organization of the Report**

The final report is organized into six chapters. The chapters are designed to give the reader a comprehensive overview of the City's M/WBE program, the environment in which the program operates, and a broad understanding of key issues and patterns related to availability and utilization of minority- and women-owned firms.

In addition to this introductory chapter, the final report includes the following chapters, each of which provides background information, detailed methodology, findings, analyses, and recommendations:

- Chapter 2 presents an in-depth legal analysis of relevant court cases including a discussion of weight given to evidence of discrimination.
- Chapter 3 analyzes City contracting and procurement policies and procedures; reviews the City's M/WBE program; and analyzes race-data and gender-neutral and -specific programs.
- Chapter 4 presents the methodology used in the collection of data regarding prime and subcontractor construction contracts, general services contracts, and the purchases of commodities data as they relate to market area, utilization, availability, and disparity.
- Chapter 5 provides the analyses of anecdotal evidence collected from personal interviews, a phone survey, and public hearings.
- Chapter 6 summarizes the report and presents recommendations.

The Appendix provided under separate cover, contains:

- Appendix A which provides copies of various forms used by the City in relation to purchasing, race- and gender-neutral programs, and race- and gender-specific programs.
- Appendix B which provides the survey instrument sent to prime contractors to verify subcontractors and detailed lists of City construction and purchase contracts and subcontracts.
- Appendix C, provides a list of the National Institute of Government Purchasing (NIGP) codes and descriptions for each of the relevant categories: construction, goods and services, and commodities.
- Appendix D, provides a copy of anecdotal data collection instruments.